

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

MARCELINA DIAZ,

Defendant and Appellant.

G044411

(Super. Ct. No. 09NF1836)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Richard W. Stanford, Jr., Judge. Affirmed in part and reversed in part.

Cathy A. Neff, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Barry Carlton and Teresa Torreblanca, Deputy Attorneys General, for Plaintiff and Respondent.

* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of part IIB.

A jury convicted defendant Marcelina Diaz of first degree residential burglary (Pen. Code, §§ 459, 460, subd. (a); all statutory citations are to the Penal Code unless noted), false representation to a police officer (§ 148.9), and misdemeanor possession of burglary tools (§ 466). The jury also found a person other than an accomplice was present at the time of the burglary. (§ 667.5, subd. (c)(21).) Diaz challenges the sufficiency of the evidence to support her conviction for possession of burglary tools. She argues latex gloves and a large purse or bag do not fall within section 466's burglary tool prohibition. She also disputes the validity of her residential burglary conviction because the trial court failed to define theft for the jury. In the published portion of this opinion, we conclude gloves and a bag do not constitute burglary tools where no evidence suggests they were possessed to break into or gain access to a victim's property, and they do not resemble items the Legislature has specified are burglary tools in section 466. We therefore reverse Diaz's conviction for possession of burglary tools.

I

FACTUAL AND PROCEDURAL HISTORY

On the afternoon of June 29, 2009, 82-year-old Frances Painter became disturbed and fearful as she sat in the den of her Buena Park home when Diaz, a stranger, would not retreat from her doorstep, but instead repeatedly rang her doorbell. Diaz pressed the buzzer at least 10 times in what "seemed like an eternity" to Painter, who generally did not answer the door if she did not recognize the person through the window. Diaz eventually walked away, but soon returned and when Painter again did not respond to the door buzzer, Diaz turned past the den window and climbed over a wall into Painter's backyard. Painter telephoned 911. Diaz pried open a locked screen door, but

found further entry blocked by a locked sliding glass door. Undeterred, she walked around the house and tried the kitchen door before the police arrived and intercepted her.

Diaz twice provided arresting officers with false information concerning her name and date of birth. The officers found a large black bag in the backyard containing blue latex gloves. An officer testified based on his training and experience these were “burglary tools.” The “empty bag means you fill it up with stuff” A burglar would use the gloves “to conceal . . . the person’s identity by the fingerprints.” The officer explained thieves commit daytime residential burglaries because the resident is usually away.

At the police station after her arrest, the officers obtained Diaz’s fingerprints and discovered her true name. Diaz claimed she lied because she had been scared. She admitted the bag belonged to her.

Following a trial in October 2010, a jury convicted Diaz as noted above. The trial court imposed and suspended execution of a six-year, eight-month prison sentence and placed Diaz on probation with terms that included a one-year jail sentence.

II

DISCUSSION

A. *Substantial Evidence Does Not Support the Burglary Tools Conviction*

Diaz contends there is insufficient evidence to sustain her burglary tools conviction. She argues the Legislature’s definition of burglary tools in section 466 does not include a bag containing latex gloves. We agree.

Section 466 provides in relevant part: “Every person having upon him or her in his or her possession a picklock, crow, keybit, crowbar, screwdriver, vise grip pliers, water-pump pliers, slidehammer, slim jim, tension bar, lock pick gun, tubular lock

pick, bump key, floor-safe door puller, master key, ceramic or porcelain spark plug chips or pieces, *or other instrument or tool* with intent feloniously to break or enter into any building . . . or vehicle . . . is guilty of a misdemeanor.” “[I]n order to sustain a conviction for possession of burglary tools in violation of section 466, the prosecution must establish three elements: (1) possession by the defendant; (2) of tools within the purview of the statute; (3) with the intent to use the tools for the felonious purposes of breaking or entering.” (*People v. Southard* (2007) 152 Cal.App.4th 1079, 1084-1085.)

“When reviewing the sufficiency of evidence to support a criminal conviction, we ask whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. [Citation.] We view the whole record in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence to determine whether the record discloses substantial evidence. [Citations.] ‘Before a judgment of conviction can be set aside for insufficiency of the evidence to support the trier of fact’s verdict, it must clearly appear that upon no hypothesis whatever is there sufficient evidence to support it.’ [Citation.]” (*People v. Kwok* (1998) 63 Cal.App.4th 1236, 1245.)

Diaz relies on *People v. Gordon* (2001) 90 Cal.App.4th 1409 (*Gordon*). There, an auto burglary victim discovered the defendant pulling a car stereo speaker out of his car. The rear passenger window of the vehicle had been shattered into small pieces. About a month later, a police officer saw the defendant standing near another vehicle in which two men were either removing or installing a stereo. The officer found two small pieces of porcelain from a spark plug in the defendant’s pants pocket. At trial, a police officer testified that thieves use pieces of ceramic spark plugs to shatter car

windows because it made less noise than entry by other means. The jury convicted the defendant of violating section 466.

The appellate court reversed. The court observed ceramic pieces were not listed in section 466, and determined they did not fall under the “other instrument or tool” language in that section. The court relied on the doctrine of *ejusdem generis*, “which applies when general terms follow a list of specific items or categories, or vice versa. [Citation.] Under this rule, application of the general term is “*restricted to those things that are similar to those which are enumerated specifically.*” [Citations.]” (*Gordon, supra*, 90 Cal.App.4th at p. 1412, italics added.) Observing the “items specifically listed as burglar’s tools in section 466 are keys or key replacements, or tools that can be used to pry open doors, pick locks, or pull locks up or out,” and noting that *ejusdem generis* ““applie[s] with stringency”” in construing criminal statutes, *Gordon* concluded: “None of the devices enumerated are those whose function would be to break or cut glass — e.g., rocks, bricks, hammers or glass cutters, and none of the devices listed resembles ceramic spark plug pieces that can be thrown at a car window to break it.” (*Id.* at pp. 1412-1413.) *Gordon* held that “the test is not whether a device can accomplish the same general purpose as the tools enumerated in section 466; rather, the device itself must be *similar* to those specifically mentioned.” (*Id.* at p. 1413.)

A bag containing latex gloves is not similar to the items enumerated in section 466. As exemplified in *Gordon*, the *ejusdem generis* canon of construction presumes that if the Legislature intends a word or words to be used in an unrestricted sense, it does not also offer as examples peculiar things or classes of things since those descriptions then would constitute surplusage. (*Gordon, supra*, 90 Cal.App.4th at

pp. 1412-1413; see also *Martin v. PacifiCare of California* (2011) 198 Cal.App.4th 1390, 1402 (*Martin*) [*eiusdem generis* gives significance to all words chosen by Legislature].)

The Attorney General urges us to disregard *Gordon* and instead follow *People v. Kelly* (2007) 154 Cal.App.4th 961 (*Kelly*). There, a police officer responding to a report of an automobile burglary in progress found the defendant near a van with a shattered rear passenger window. The defendant's backpack contained a box cutter, a slingshot, and a flashlight. A police officer identified these items as burglary tools based on his experience investigating auto burglaries. He explained that burglars use a slingshot with a ceramic chip to break automobile windows, box cutters to cut car stereo wires, and flashlights to see inside dark car interiors.

Kelly concluded the officer's testimony constituted sufficient evidence to sustain a probation violation for possession of burglary tools. *Kelly* acknowledged as "arguably questionable" the classification of ceramic chips as an "instrument or tool" under section 466, but found a slingshot or a box cutter fell squarely within that category. (*Kelly, supra*, 154 Cal.App.4th at p. 966.) *Kelly* noted the Legislature amended section 466 after *Gordon* to specifically include ceramic or porcelain spark plug chips or pieces among the enumerated burglary tools. (*Id.* at pp. 966-967.) According to *Kelly*, this legislative action undermined, rather than supported the conclusion at the time *Gordon* was decided that section 466 encompassed only items a burglar could use to unlock, pry, or pull something open. (*Ibid.*)

Kelly also faulted *Gordon* for resorting to *eiusdem generis* as an interpretative canon. *Kelly* found nothing ambiguous in the statutory language proscribing possession of "an instrument or tool" with the specified felonious intent. *Kelly* nevertheless relied on the Legislature's purpose behind section 466. (But see

People v. Gonzalez (2008) 43 Cal.4th 1118, 1126 (*Gonzalez*) [ascertaining a statute’s purpose unnecessary when its words are unambiguous].) *Kelly* concluded *Gordon*’s holding “thwarts, rather than effectuates, the plain legislative purpose to deter and prevent burglaries.” (*Kelly, supra*, 154 Cal.App.4th at p. 967.)

According to *Kelly*, *Gordon*’s interpretation of section 466 would allow law enforcement to apprehend only persons “who employ a limited set of means to achieve their nefarious ends, while malfeasants who use other means to break and enter are immunized from punishment even where the evidence establishes their intent to use the tool or instrument in their possession to commit burglary. We see nothing in the statute that indicates this is what the Legislature intended. To the contrary, we think the plain import of ‘other instrument or tool,’ and the only meaning that effectuates the obvious legislative purpose of section 466[,] includes tools that the evidence shows are possessed with the intent to be *used* for burglary.” (*Kelly, supra*, 154 Cal.App.4th at pp. 967-968, italics added.) *Kelly* did not address the “other instrument or tool . . . *to break or enter*” language in section 466 (italics added), but instead appears to suggest any item that may be put to use during the course of a burglary suffices for conviction.

Thus, the Attorney General argues under *Kelly* that “tools . . . possessed with the intent to be *used* for burglary” fall under section 466’s proscription. (Italics added.) She notes the officer in this case testified burglars commonly use gloves to prevent leaving fingerprints and DNA that may later be detected at the crime scene, and they use empty bags to carry and conceal their ill-gotten gains after gaining entry. According to the Attorney General, “under the reasoning of *Kelly*, there was sufficient evidence for the jury to conclude that the latex gloves and empty bag were instruments or tools within the scope of section 466.”

We have found no cases holding gloves and bags, or similar articles, meet the statutory definition of burglary tools under section 466.¹ To the contrary, our review of the statute’s legislative history supports an interpretation of section 466 closer to *Gordon*’s than to *Kelly*’s. (See *Gonzalez, supra*, 43 Cal.4th at p. 1126 [“If the statute is ambiguous, we may consider a variety of extrinsic aids, including legislative history, the statute’s purpose, and public policy”].)

When the Legislature added “ceramic or porcelain spark plug chips or pieces” in 2002 in response to *Gordon*, legislative analyses noted the bill was intended to resolve a conflict between *Gordon* and another opinion, subsequently superseded by the Supreme Court’s grant of review, which held ceramic chips *could* constitute a burglary tool. One analysis noted *Gordon* “found that an instrument is not a burglar tool just because it can accomplish the same purpose as the listed tools, but that the device must be similar to those specifically listed. . . . *This bill resolves the conflict . . . by adding ceramic or porcelain spark plugs [or pieces] to the enumerated list of ‘burglar’s tools’ within . . . [s]ection 466.*” (Assem. Com. on Pub. Safety, Rep. on Assem. Bill No. 2015 (2001-2002 Reg. Sess.) April 2, 2002, pp. 2-3.) Another analysis noted the Supreme Court likely would “consider the effect of the general reference to ‘other instrument or tool’ in the burglary tool statute, in light of the very specific list of items that are defined as burglary tools.” (Sen. Com. on Pub. Safety, Rep. on Assem. Bill No. 2015 (2001-2002 Reg. Sess.) June 11, 2002, p. F.) Additionally, another analysis noted, “AB 2015 will

¹ In *People v. Carnes* (1959) 173 Cal.App.2d 559, the question was whether an officer had legal cause to arrest the defendant for burglary. The officer looked into the defendant’s car and observed what he described as ““numerous tools, and a radio and gloves, and a flashlight.”” (*Id.* at p. 566.) The appellate court upheld the finding of legal cause to arrest stating, “These tools and articles could fairly be described as burglar’s tools.” (*Id.* at p. 566.) But the court was not called upon to consider whether possession of the gloves constituted a violation of section 466.

allow justice to be served *without opening section 466 to include an overly broad range of generic objects, such as rocks or pieces of tile, that could be used to break windows.*”

(Sen. Rules Com. Off. Of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 2015 (2001-2002 Reg. Sess.) as amended June 25, 2002, p. C, italics added.)

The legislation and associated analyses demonstrate the Legislature accepted *Gordon’s* application of *ejusdem generis* in interpreting section 466. The Legislature did not resolve the conflict concerning section 466 by amending the statute to eliminate *Gordon’s* requirement of similarity of purpose and design.² Rather, it added an item to the list without supplanting the usual *ejusdem generis* canon that applies when specific and general words are used together in a statute. (*Martin, supra*, 198 Cal.App.4th at p. 1402.)

Accordingly, we conclude section 466 is limited to instruments and tools used to break into or gain access to property in a manner similar to using items enumerated in section 466. That the perpetrator breaks into or enters property, or attempts to do so, *and* happens to have access to a tool that may be used in the course of the burglary is not enough. The tool must be for the purpose of breaking, entering, or otherwise gaining access to the victim’s property. Nor is it enough that a common implement may be used for breaking and entering, given the Legislature itself has specified its intent was “to add only ceramic or porcelain spark plug chips or pieces, not other common objects such as rocks or pieces of metal that can be used to break

² When the Legislature added “bump key” to the list of items in 2008 (Stats. 2008, c. 119 (S.B.1554), § 1), legislative analyses noted that “devices *similar to listed burglary tools* would likely be considered a burglary tool,” and “[a]ppellate decisions have held that a device is a burglary tool *if it is similar in design and application to a burglary tool specifically listed . . .*” (Assem. Com. on Appropriations, Rep. On Sen. Bill No. 1554 (2007-2008) June 18, 2008, pp. 1-2, italics added.)

windows, to the list of burglary tools in section 466 of the Penal Code.” (Stats. 2002, ch. 335, § 2.)

Here, there was no evidence that common latex gloves or the bag in which they were found could be used or were intended to score a breach in Painter’s home defenses or otherwise gain Diaz entry or access to Painter’s property, nor that these items were in any way similar to items the Legislature has set apart in section 466 for additional punishment when possessed as burglary tools. We have no authority to add gloves and bags to the statute by judicial decree, which would expand potential criminal prosecution to possession of a broad range of generic objects, contrary to legislative intent. For the foregoing reasons, we conclude substantial evidence does not support Diaz’s conviction for possession of burglary tools.

B. The Trial Court Did Not Prejudicially Err in Failing to Define Theft

The trial court instructed the jury on the elements of burglary by providing a version of CALCRIM No. 1700: “The defendant is charged in Count 1 with burglary in violation of Penal Code section 459. To prove that the defendant is guilty of this crime, the People must prove that: 1. The defendant entered a building; [¶] AND [¶] 2. When she entered the building, she intended to commit theft.”³ Neither the prosecution nor defense counsel objected to the instructions as provided, nor did either party request the court to define theft for the jury.⁴ In closing argument the prosecutor informed the jury

³ Section 459 provides in relevant part, “Every person who enters any house . . . with intent to commit grand or petit larceny or any felony is guilty of burglary.”

⁴ The jury was also informed Diaz need not have actually committed theft, and a person enters a building if some part of her body penetrates the area inside the building’s outer boundary, including inside a window screen. (See *People v. Valencia* (2002) 28 Cal.4th 1, 13.)

that to convict Diaz it must find she intended to steal. The jury did not ask for a definition of theft.⁵

A trial court must instruct on general principles of law that are commonly or closely and openly connected to the facts before the court and that are necessary for the jury's understanding of the case, even in the absence of a request. (*People v. Montoya* (1994) 7 Cal.4th 1027, 1047.) The trial court's duty to instruct sua sponte, or on its own motion, includes the duty to instruct on all of the elements of a charged offense. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1311.) Regarding matters that fall outside a court's duty to instruct sua sponte on general principles of law, it is the defendant's obligation to request any clarifying or amplifying instructions. (*People v. Estrada* (1995) 11 Cal.4th 568, 574 (*Estrada*); *People v. Kimble* (1988) 44 Cal.3d 480, 503.) A defendant's "failure to request such a clarifying [or amplifying] instruction at trial . . . waives his claim on appeal. [Citations.]" (*People v. Hart* (1999) 20 Cal.4th 546, 622; *People v. Lang* (1989) 49 Cal.3d 991, 1024 ["A party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language"].)

"The language of a statute defining a crime or defense is generally an appropriate and desirable basis for an instruction, and is ordinarily sufficient when the defendant fails to request amplification. If the jury would have no difficulty in understanding the statute without guidance, the court need do no more than instruct in statutory language." (*People v. Poggi* (1988) 45 Cal.3d 306, 327.) Furthermore, "where the terms 'have no technical meaning peculiar to the law, but are commonly understood

⁵ The only questions asked by the jury during deliberations concerned the location of Diaz's residence, and whether she was "tested for drugs and alcohol." The court reminded the jury no evidence concerning either topic was admitted, and therefore "you will not know these things."

by those familiar with the English language, instructions as to their meaning are not required. [Citations.]” (*People v. Howard* (1988) 44 Cal.3d 375, 408, quoting *People v. Anderson* (1966) 64 Cal.2d 633, 639; *Estrada, supra*, 11 Cal.4th at p. 574.) As the Supreme Court in *Estrada* explained: “A word or phrase having a technical, legal meaning requiring clarification by the court is one that has a definition that *differs* from its nonlegal meaning. [Citation.] [T]erms are held to require clarification by the trial court when their statutory definition differs from the meaning that might be ascribed to the same terms in common parlance. [Citation.]” (*Estrada, supra*, at pp. 574-575.)

Here, the trial court’s burglary instruction tracked section 459’s language defining burglary. Based on the evidence and the prosecution’s theory, the only possible type of intended theft in this case was theft by larceny. In general, theft by larceny “requires the taking of another’s property, with the intent to steal and carry it away. [Citation.]” (*People v. Gomez* (2008) 43 Cal.4th 249, 254-255.) The elements of theft by larceny are: (1) the defendant took possession of personal property owned by someone else; (2) the defendant did so without the owner’s consent; (3) when the defendant took the property, he or she intended to deprive the owner of it permanently; and (4) the defendant moved the property, even a small distance, and kept it for any period of time, however brief. (*People v. Catley* (2007) 148 Cal.App.4th 500, 505; § 484, subd. (a).)

The elements of theft by larceny do not differ from the common, everyday understanding of the word “theft.” (See Random House Dict. of the English Language (2d ed. 1987) p.1966.) The intent to permanently deprive is implicit within the common meaning of theft and follows common sense, not “absolute[s].” (*People v. Avery* (2002) 27 Cal.4th 49, 57 [““common sense”” reflects that a theft occurs with an intent to deprive another of property permanently, which includes thwarting an owner’s ““main value”” of

his property or deprivation for an unreasonable length of time].) Accordingly, the trial court did not have a sua sponte duty to instruct on the definition of theft.

Diaz's reliance on *People v. Failla* (1966) 64 Cal.2d 560 and similar cases is misplaced. *Failla* involved an instruction defining burglary as entry of an apartment with intent to commit theft *or any felony*. (*Failla*, at p. 563.) *Failla* concluded the trial court erred in failing to give a further instruction on its own motion advising the jury which acts the defendant may have intended to commit that would constitute felonies, and defining the felony. (*Id.* at p. 564.) *Failla* did not find instructional error in failing to define theft. Accordingly, *Failla* does not require a different result in this case.

We disagree with Diaz the trial court deprived her of the "right to have the jury determine every element of the burglary charge." As noted above, the jury was instructed on the definition of burglary, and told it must find she intended to commit theft when she entered the building. Other than an intent to steal, the elements of larceny are not germane to determining whether a defendant committed an attempted burglary. Diaz should have asked for clarifying instructions if she felt the common understanding of theft was somehow inadequate.

Diaz also argues "there was an issue here regarding [her] mental stability at the time the offense was committed." She relies on testimony from the officer at the scene to whom Diaz gave false identifying information. When the prosecutor asked about Diaz's demeanor, the officer confirmed "she did not appear scared," and that "[s]he appeared confused, maybe disoriented. When I talked to her it took her awhile to answer. She looked like she was having a hard time putting her thoughts together." Appellate counsel suggests Diaz's mental confusion demonstrated the need for a definition of the requisite intent. "Diaz could have had any number of reasons that are not criminal for

attempting to enter the residence. For example, she may have been looking for someone to help her, she may have needed water, she may have needed to go to the bathroom, she may have needed to get out of the heat, she may have believed that someone of her acquaintance occupied the residence, or, in her befuddled state, she may not have formed any intent at all as to why she was trying to enter the residence.”

There was no evidence Diaz was mentally unstable. After taking measures to determine whether anyone was home, she hopped over a wall into a stranger’s backyard and began trying to open doors. She carried latex gloves and a large empty bag. If she was confused when asked to identify herself, her deception in furnishing multiple false names suggests she was only uncertain about how to escape apprehension, not about her identity or reality.

But more to the point, Diaz does not explain how an instruction defining theft by larceny would have impacted the jury’s assessment of her mental stability and intent at the time of entry. If the jury determined she was looking for help, needed water or to get out of the heat, to use the lavatory, or believed an acquaintance occupied the residence, it would not have found she attempted to enter the residence with the intent to commit “theft.” It is not reasonably probable Diaz would have obtained a more favorable verdict on the burglary charge had the trial court instructed on theft by larceny. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

III

DISPOSITION

Diaz's conviction for possessing of burglar's tools in violation of section 466 in count 3 is reversed. The judgment is affirmed in all other respects.

ARONSON, ACTING P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.